

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
<i>Computer III</i> Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial	)	
Regulatory Review – Review of	)	
<i>Computer III</i> and ONA Safeguards and	)	
Requirements	)	

**AT&T COMMENTS IN OPPOSITION TO SBC  
PETITION FOR DECLARATORY RULING OR WAIVER OF OSS SAME  
ACCESS REQUIREMENT**

Pursuant to the Commission's Public Notice in the above-captioned proceeding,<sup>1</sup> AT&T Corp. ("AT&T") submits these comments in opposition to SBC's Petition for Declaratory Ruling or Waiver of OSS Same Access Requirement in the above referenced proceeding ("*SBC Petition*").<sup>2</sup> SBC seeks a waiver of the Commission's *Computer III* "same access" requirement so that SBC may provide Advanced Solutions, Inc. ("ASI"), its advanced service affiliate, with direct access to SBC's back office systems, while

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<sup>1</sup> Pleading Cycle Established for Comments on SBC Petition for Declaratory Ruling or Waiver of OSS "Same Access" Requirement, CC Docket Nos. 95-20, 98-10, DA 04-2883 (Sept. 3, 2004).

<sup>2</sup> Under the Commission's "same access" requirement, the BOCs' enhanced services operations must take the same OSS access as the BOC provides to independent enhanced service providers once the structural separation requirements are lifted. *See Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd. 3103, para. 43 (1990) ("*BOC ONA Amendment Order*"). *See also Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 97, para. 4 (1993) ("*BOC ONA Amendment Reconsideration Order*").

providing only mediated access to unaffiliated enhanced service providers (“ESPs”).<sup>3</sup> SBC fails to show that the mediated access ESPs and others receive today is comparably efficient to the direct access proposed by SBC, or that the *Computer III* requirements should no longer apply to these arrangements. The relief SBC seeks cannot be granted in response to a request for a declaratory ruling or a waiver in any event and accordingly, the *SBC Petition* should be denied.

The *SBC Petition* attempts to tilt the competitive playing field in SBC’s favor by declaring the “same access” rule, a longstanding safeguard against anti-competitive conduct, to be inapplicable or obsolete. In the *Computer III* proceeding, the Commission determined that BOCs must offer comparably efficient interconnection (“CEI”) to competing providers of enhanced services.<sup>4</sup> In their Open Network Architecture (“ONA”) filings, the BOCs did not offer to provide ESPs with direct access to their operations support systems (“OSS”). Instead, SBC and the other BOCs offered only indirect access through intermediary gateway processors that can significantly limit ESP utilization of OSS services.<sup>5</sup> Rather than demonstrate that their mediated gateway access is comparably efficient to direct access, the BOCs claimed that direct access would raise

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<sup>3</sup> SBC plans to consolidate within ASI operations, installation and maintenance functions for SBC’s broadband services, including the advanced services provided by ASI, SBC Telecom, Inc. and SBC Long Distance Services, Inc., as well as the broadband information services provided by SBC Internet Services, Inc. *SBC Petition* at 3.

<sup>4</sup> *Computer III Phase I Reconsideration Order*, 2 FCC Rcd 3035, 3048, para. 92 (1987).

<sup>5</sup> *BOC ONA Amendment Order*, para. 39.

issues of network security and control, and that mediated access is “necessary to ensure network integrity and to protect proprietary information.”<sup>6</sup>

In the *Computer III* proceedings, the Commission recognized the BOCs’ claims but made clear that the failure of the BOCs to offer comparably efficient access by ESPs to OSS functions raised fundamental competitive concerns:

“We agree with the BOCs that ‘direct access’ to OSS functions raises serious questions of network security and control, including the continued proprietary nature of network information regarding individual network customers. On the other hand, we believe that there are serious competitive questions raised by relegating independent ESPs to indirect access status. If, for instance, the BOC’s enhanced services operation has real-time access to OSS information while an independent ESP receives only infrequent access to the same information, the playing field would be far from level.”<sup>7</sup>

After a careful review, the Commission determined that the record was insufficient to support a conclusion that the BOCs’ mediated gateways were comparably efficient to direct access. The Commission thus “require[d] the BOCs’ enhanced services operations to take the same access the BOC provides independent ESPs” until the BOCs could demonstrate that the access offered to ESPs is comparably efficient to the access taken by the BOCs’ enhanced services operations.<sup>8</sup>

In the *Computer III Phase I Reconsideration Order*, the Commission made clear that “[f]actors that we will use in evaluating whether the standard has been met include the absence of systematic differences between basic service access given to the carrier

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<sup>6</sup> *Id.*

<sup>7</sup> *BOC ONA Amendment Order*, para. 43.

<sup>8</sup> *Id.* See also *BOC ONA Amendment Reconsideration Order*, para. 4 (“We reaffirm our decision in the BOC ONA Amendment Order and require that until the BOCs can demonstrate that indirect access and direct access to the OSS services specified in that order are comparably efficient, the BOCs’ enhanced services must take the same types of access to those specified OSS services.”)

and to others, end-user perception of equality, and utility to other enhanced service providers, i.e. whether any technical differences make a difference in the ability of competitors to provide their enhanced services.”<sup>9</sup> In the Petition, SBC makes no showing that the mediated access it currently provides is comparably efficient to the direct access ASI and other SBC affiliates would enjoy. Instead, SBC makes tortured arguments purporting to show that the Commission’s “same access” requirement is outdated, obsolete or has been effectively abandoned.<sup>10</sup> SBC thus seeks a waiver or, in the alternative, a declaratory ruling stating that the Commission’s “same access” rule does not apply to ASI.

Pursuant to Section 1.3 of the Commission’s rules, the Commission may waive a rule only upon a showing of “good cause.”<sup>11</sup> As the Commission has made clear, an “applicant [for waiver] faces a high hurdle even at the starting gate.”<sup>12</sup> The applicant must demonstrate that a waiver “is in the public interest” and the Commission may “only waive a provision of its rules for ‘good cause shown.’”<sup>13</sup> In making the determination, “[t]he Commission must take a ‘hard look’ at applications for waiver and must consider

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<sup>9</sup> *Computer III Phase I Reconsideration Order*, 2 FCC Rcd 3035, 3048, para. 92 (1987). See also *BOC ONA Amendment Reconsideration Order*, fn.12.

<sup>10</sup> SBC Petition at 11-13.

<sup>11</sup> See 47 C.F.R. § 1.3. (“The provisions of this chapter may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter.”)

<sup>12</sup> *Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 2004 WL 1469354, para. 110 (June 30, 2004) (“*Telecommunications Relay Services Order*”) (Citation omitted).

<sup>13</sup> *Id.*

all relevant factors when determining if good cause exists.” In addition, the Commission “must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation.”<sup>14</sup>

The *SBC Petition* fails to present special circumstances that would warrant deviation from the rule. SBC claims that in order to take full advantage of certain efficiencies authorized by the Commission in its *OI&M Order*, SBC must consolidate within ASI the operations, installation and maintenance (“OI&M”) functions for advanced telecommunications services currently provided by ASI, SBC Telecom and SBC Long Distance Services, and the broadband information services provided by SBC Internet Services.<sup>15</sup> In the *OI&M Order*, the Commission eliminated its prohibition on the sharing of OI&M between the BOC and its section 272 affiliates.<sup>16</sup> The Commission did not repeal, or even address, the *Computer III* “same access” requirement.

Under SBC’s planned consolidation “ASI personnel would have direct access to the back-office systems that support these various affiliates, and it would utilize that direct access to perform OI&M, customer care, and other services on behalf of each of them.”<sup>17</sup> If it is unable to consolidate operations, SBC claims, it will have to implement overlapping ordering, customer care, provisioning, maintenance and network

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<sup>14</sup> *Telecommunications Relay Services Order, supra*. See also *Industrial Broadcasting v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970).

<sup>15</sup> *SBC Petition* at 2-3.

<sup>16</sup> See Section 272(b)(1)’s “Operate Independently” Requirement for Section 272 Affiliates, Report and Order and Memorandum Opinion and Order, 19 FCC Rcd 5102, 5112-15, (2004) (“*OI&M Order*”).

<sup>17</sup> *SBC Petition*, at 3.

management systems for DSL, ATM and frame relay services, at a cost of approximately \$36.9 million per year.<sup>18</sup> No public interest is served by placing unaffiliated ESPs at a competitive disadvantage so that SBC can reap the full benefit of the efficiencies contemplated in the *OI&M Order*. The *SBC Petition* fails to show that SBC is precluded by the “same access” rule from realizing the efficiencies intended by the *OI&M Order*. SBC cannot show hardship or special circumstance if it can realize these efficiencies simply by using the same mediated access provided to ESPs and others.

SBC claims that if its request is granted, ASI will continue to provide unaffiliated ESPs with “comparably efficient OSS access, through the same interfaces they enjoy today.”<sup>19</sup> The Petition provides no substantial basis for the Commission to conclude that SBC’s mediated access will be comparably efficient to the proposed direct access ASI and the other SBC affiliates will enjoy. While SBC claims “ASI is continuously looking for ways to improve the efficiency with which it provides access to its systems,” and “ESPs . . . can look forward to potentially receiving even more robust access in the future,”<sup>20</sup> mediated access and direct access are simply not comparably efficient. With direct access, ASI can be expected, at a minimum, to avoid middleware and mediated interface server outages. ASI thus will not experience the service disruptions and service degradation that users of mediated access experience.<sup>21</sup> Nor will ASI be required to

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<sup>18</sup> *SBC Petition* at 8.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 12.

<sup>21</sup> SBC’s mediated interface adds a level of software and hardware complexity to OSS that is not present in direct access. Mediated access involves the use of physical connectivity, hardware servers, and middleware software to broker external transactions to internal back end systems like LFACS, as well as special programs within such

distribute its order volumes evenly, or ration its orders carefully in order to avoid additional outages caused by mediated access interfaces.

In the absence of direct access to SBC's systems, ESPs must also depend on SBC to build the capabilities needed to deliver critical information through these interfaces. SBC controls the process, determines which change requests it will honor, and decides when the approved capabilities will be made available.<sup>22</sup> In contrast, if given direct access to SBC's internal databases, such as the Loop Facility Assignment and Control System, ASI will have real time access to raw data concerning assigned and available loops that is denied to ESPs, including loop qualification data that are based upon actual, rather than approximated characteristics of individual loops. As the Commission stated in the *BOC ONA Amendment Order*, the playing field will be far from level if a BOC's enhanced services operation has real-time access to OSS information that ESPs receive infrequently, if ever.

SBC's proposal to provide direct access to ASI while providing ESPs with mediated access is plainly discriminatory. What SBC seeks, therefore, is more than a waiver of the Commission *Computer III* rules. It is a waiver of the *statutory* non-discrimination requirements of the Communications Act, which require ILECs to provide

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systems to extract the information SBC chooses to make available to ESPs and others. These programs malfunction, sometimes for months at a time before a root cause is identified, limiting the ability of ESPs and others to serve their end users.

<sup>22</sup> See, e.g. *Matter of Joint Application by SBC for In-Region InterLATA Services in Arkansas and Missouri*, CC Docket 01-194, Affidavit of Derrick Hamilton For Missouri, paras. 5-9 (describing various enhancements to loop qualification system through which SBC controls access to loop qualification or makeup information contained in its databases.)

nondiscriminatory access to unbundled network elements, including OSS.<sup>23</sup> The Commission has acknowledged that in certain circumstances it may waive its rules or requirements at the behest of regulated carriers. It has no authority to waive the core statutory non-discrimination requirements of the Act.<sup>24</sup>

In the alternative, SBC seeks “a declaratory ruling that ‘same access’ is no longer required to achieve the comparable efficiency required under the *Computer III* regime” in order to remove “a cloud of uncertainty as to whether SBC may take full advantage of the OI&M decision.”<sup>25</sup> A declaratory ruling is appropriate only where necessary to remove uncertainty or to terminate a controversy.<sup>26</sup> SBC tries mightily to create a controversy, by claiming that the Commission’s section 271 decisions holding that mediated access meets the nondiscrimination requirements of section 251 “cannot be squared with, and thus effectively overrule” the Commission’s Open Network Architecture (“ONA”) orders holding that BOCs must provide the ‘same access’ to unaffiliated ESPs as is utilized by

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<sup>23</sup> See 47 U.S.C. Sections 251 and 271(c) (2) (B) (ii). The Commission has held that “Congress did not intend that the term ‘nondiscriminatory’ in the 1996 Act be synonymous with ‘unjust and unreasonable discrimination’ used in the 1934 Act, but rather, intended a more stringent standard.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, para. 217 (1996).

<sup>24</sup> See *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, 15 FCC Rcd 7170, 7178 (1999). See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes.”)

<sup>25</sup> *SBC Petition* at 3-4.

<sup>26</sup> See 47 C.F.R. § 1.2 (“The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”)



the BOCs' affiliated enhanced services operations.<sup>27</sup> But the decisions cited by SBC make no relevant reference to the *Computer III* nondiscrimination provisions. SBC then claims (at 3) that the *Computer III* rules do not apply to ASI in any event, because the rules apply only to Bell operating companies and their successors and assigns. But the *ASCENT* court has held that ASI is indeed a successor or assign of the SBC ILECs.<sup>28</sup>

Even if sense can be made of SBC's tormented logic, the relief SBC seeks cannot be issued in response to a request for a declaratory ruling. In the *CMRS Access Charge* proceeding, the Commission acknowledged it has no authority simply to declare that binding rules do not apply. "[A] declaratory ruling proceeding is an adjudication" in which the Commission "declares" what the current law is—"not a rulemaking under the Administrative Procedure Act."<sup>29</sup> In the *Computer III* decisions, the Commission promulgated binding rules that expressly cover the provision of access to SBC's OSS by

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<sup>27</sup> *SBC Petition* at 4.

<sup>28</sup> See *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). SBC claims nonetheless that ASI is a successor or assign of the SBC ILECs *for purposes of Section 251 only*. *SBC Petition*, at 3 and fn.4. But as several entities have argued, the *ASCENT* decision renders ASI a successor and assign of the SBC ILECs *for all purposes*. Cf. *SBC Petition*, at fn. 4. ("The uncertainty is heightened by the fact that some entities have argued (incorrectly in ASI's view), that the *ASCENT* decision renders ASI a successor or assign of the SBC ILEC for all purposes.")

<sup>29</sup> *Petitions of Sprint PCS and AT&T Corporation*, Declaratory Ruling, 17 FCC Rcd 13192, 13200, fn.51 (2002). As Commissioner Abernathy stated in the *AT&T IP Telephony Classification Order*, a "declaratory ruling" proceeding "clarifies the existing state of the law" while "a rulemaking" proceeding "establishes new rules (which may modify or eliminate existing rules)." *Petition for Declaratory Ruling that AT&T's Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7476 (2004). See also *New York State Commission on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (A declaratory ruling proceeding is "an adjudication under section 5(e) of the Administrative Procedure Act").

ESPs. The *Computer III* rules are the product of a notice and comment proceeding, and accordingly can be repealed only in a notice and comment rulemaking proceeding.<sup>30</sup>

In the *Broadband Access NPRM*, the Commission sought comment on the application of the *Computer III* requirements to the BOCs' provision of broadband Internet access services.<sup>31</sup> In particular, the Commission asked whether it should decline to impose *Computer III* requirements on broadband Internet access services once a BOC has received section 271 authority.<sup>32</sup> The Commission has received extensive comment on the subject from numerous parties, but has not yet ruled.<sup>33</sup> SBC can obtain the relief that it ultimately seeks—the repeal of the Commission's "same access" requirement—only through the type of rulemaking proceeding that it seeks to avoid by filing this Petition.

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<sup>30</sup> *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal.")

<sup>31</sup> See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3041 (2002) ("*Broadband Access NPRM*").

<sup>32</sup> *Broadband Access NPRM* (para. 48) ("Is it possible that once a certain amount of competition exists in the provisioning of key telecommunications functions, requirements like those of CEI and ONA may not be necessary to ensure that competing information service providers obtain the necessary inputs for delivery of their high-speed services?")

<sup>33</sup> The *SBC Petition* claims that SBC's arguments "are sound but the Commission has yet to rule on them and so there is some level of uncertainty regarding ASI's status under the *Computer III* regime." *SBC Petition* at fn.4.

## CONCLUSION

The Commission should not permit SBC to end run the *Computer III* “same access” requirements by authorizing ASI to have direct access to SBC’s OSS while SBC continues to provide mediated access to competing ESPs. SBC has failed to show that its mediated access and direct access are comparably efficient. The Commission’s “same access” rule continues to play an important role in ensuring that ESPs can compete on a level playing field, and it cannot be repealed in response to a petition for declaratory ruling or waiver. SBC’s Petition should therefore be denied.

Respectfully submitted,

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